90-1485

No._____

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

In Re JUAN PERALES, *Petitioner*

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

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I. QUESTIONS PRESENTED

1. Whether this Court should issue the writs requested herein to order the appellate judges of the Fifth Circuit to recall their mandate in aid of this Court's appellate jurisdiction and would prevent a further miscarriage of justice which has been created by the refusal of the judges of the courts below to take jurisdiction of the complaints and appeal depriving Petitioner of any adequate relief.

2. Whether the judges of the Fifth Circuit Court of Appeals by refusing to recall their mandate are in violation of the law as mandated by the Texas Supreme Court that the members of the utility board are without lawful authority to bring any action and thus failed to exercise their authority when it is their duty to do so and further abnegated their duty in failing to restrain prima facie violations of the law.

3. Whether the failure of the Fifth Circuit to recall their mandate deprived the Petitioner's liberty, rights, property, privileges and immunities in violation of access to the courts, due process, equal protection and grievance without penalties, under the U.S. Constitution thereby causing grave and irreparable harm.

4. Whether the failure of the Fifth Circuit to recall their mandate lead to the failure of the Judge of the Federal District Court to grant the relief requested by the Petitioner on behalf of himself and his clients against the defendant state court judges and others, which failure to restrain thereby further violated the constitutional rights of the Petitioner and his clients.

5. Whether the Petitioner has been prevented from obtaining adequate relief in any other court or in any other form regarding redress of the actions of the defendant state court judges which resulted from the suit brought by the utility board, which actions amount to unlawful nonjudicial acts and constitute unlawful restraints on the Petitioner's and his clients' liberties, properties, rights, privileges and legislative immunities, including but not limited to the right of local self government.

II. LIST OF THE PARTIES

1. The Petitioner herein, JUAN PERALES, is an attorney and is counsel of record for RUBEN GARZA, MIGUEL LEAL, AND CRUZ GONZALEZ, JR., Plaintiffs in a civil rights action brought against state court judges and others in the federal district court in Cause No. C-89-334, styled *Garza, et al v. Westergren, et al*; and is counsel of record in the appeal filed by the Plaintiffs from the district court of an order denying preliminary injunction, in Cause No. 89-6311, *Garza et al v. Westergren, et al*, 908 F.2d 27 (5th Cir. 1990). As a result of the appellate court mandate dismissing the appeal, the Petitioner has been harmed and consequently also filed a separate civil rights action, *pro se*, against the state court judges in Cause No. 91-60, styled *Perales v. Westergren, et al*.

2. The panel of Judges of the Fifth Circuit Court against whom this petition is directed to are: Honorable BARKSDALE, HIGGINBOTHAM, and SMITH. The Judge of the District Court, Southern District of Texas, who presided in the above styled cases and against whom this petition is also directed to is the Honorable HAYDEN HEAD.

3. The Defendants in the initial action, Cause No. C-89-334, are: MIKE WESTERGREN, Judge of the 214th District Court, Nueces County, Texas; THE CITY OF ROBSTOWN; JULIO GARCIA, Mayor of the City of Robstown; and ROY GUTIERREZ, superintendent of the city's utility systems department. Only the Defendant Westergren and Gutierrez responded to the Appeal from the district court's denial of preliminary injunction and only they responded to the complaint in the trial court. The City of Robstown never filed an answer nor did Julio Garcia, Mayor of the City of Robstown.

4. The Defendants in Petitioner's subsequent action, Cause No. 91-60, styled *Perales v. Westergren, et al*, are: MIKE WESTERGREN, Judge of the 214th District Court, Nueces County Texas; HARRY LEWIS, Retired Judge of the District Court, Cameron County, Texas; ROBERT GARZA, Judge of the 138th District Court of Cameron County, Texas; ROBERT J. SEERDEN and FORTUNATO BENAVIDEZ, Justices of the 13th Court of Appeals at Corpus Christi, Texas.

III. OFFICIAL REPORT OF OPINION BELOW AND EXHIBITS

1. The judgment and opinion of the Court of Appeals for the Fifth Circuit in respect of which this writ is sought to recall the mandate is appended to this petition in an Appendix as Exhibit A, the same being official reported in *908 F.2d 27, (5th Cir. 1990).*

2. The Motion to Recall Mandate filed on March 6, 1991 with the 5th Circuit and overruled without opinion on March 18, 1991 is appended to this petition as Exhibit B.

3. The judgment and opinion of the Supreme Court of Texas mandating that a utility board is without lawful authority to bring or maintain a suit as officially reported *Tuttle v. Guadalupe-Blanco River Authority,* 174 S.W.2d 589 (Tex. 1943) is appended to this petition as Exhibit C, which opinion was again affirmed in *Guadalupe-Blanco River Authority v. City of San Antonio,* 200 S.W.2d 989, 1000 (Tex. 1947).

4. The Plaintiffs' Renewed Application for Preliminary Injunction, Objections to Mandate of the Circuit Court of Appeals and Clarification on Hearing for Preliminary In-

junction filed with the federal district court on March 18, 1991 in Cause No. C-89-334, *Garza, et al v. Westergren, et al* is appended to this petition as Exhibit D.

5. The Petitioner's Original Complaint filed with the federal district court on March 15, 1991, against the state court judges in Cause No. 91-60, *Perales v. Westergren, et al* is attached to this petition as Exhibit E.

IV. JURISDICTION

Jurisdiction to grant the writs of prohibition, mandamus, and injunction to the Justices of the Court of Appeals and the Judge of the District Court, sought by the Petitioner herein, is conferred on this Court by the authority to issue extraordinary writs vested in this Court by the provisions of Section 1651(a), Title 28, United States Code, and Rule 20 of the Rules of this Court. This Court has jurisdiction of this Petition because it would have jurisdiction over the final judgments of the actions below under 28 U.S.C. §1291. See *Roche v. Evaporated Milk Association*, 319 U.S. 21 (1943).

Invoking federal jurisdiction under 42 U.S.C. § 1983 et seq, the Petitioner on behalf of his clients and on

behalf of himself in a separate action, brought suits in the United States District Court for the Southern District of Texas at Corpus Christi ("federal district court"), raising a federal question under 28 U.S.C. §1331, 1343, and 2202.

V. STATEMENT OF FACTS

The Petitioner filed an initial civil rights action in federal district court on behalf of his clients who are former members of the city council, against the Defendant Westergren, a state district court judge, and others in Cause No. C-89-334, styled *Garza, et al v. Westergren, et al.* The suit was based on actions taken by Judge Westergren in connection with a purported counterclaim filed by the members of the Board of Trustees of the City of Robstown's utility systems ("Utility Board") against the City of Robstown itself to restrain civil and criminal prosecutions against the Utility Board members for misapplication of the city's funds. Because the Utility Board was prohibited from filing or maintaining a suit, the Plaintiffs alleged that the machinery of the court could never be invoked so as to allow the judge to take any judicial actions nor perform any judicial functions normally taken by a judge. *Guadalupe Blanco River*

Authority v. City of San Antonio, 200 S.W.2d 989, 1000 (Tex. 1947). In disregard and indeed in violation of the law as mandated by the Texas Supreme Court, the Defendant judge "rendered judgment" permanently restraining the City of Robstown and extending to the councilmen and Petitioner as city attorney. Following alleged violations of the permanent restraint by the City of Robstown through actions of the governing body, the Defendant Westergren issued contempt citations directly against the three individual councilmen and city attorney. Consequently, the Petitioner filed the civil rights action in federal district court and requested a preliminary injunction to restrain the Defendants' actions which were taken in violation of the plain mandate of the Texas Supreme Court. Clearly, the permanent restraint and any orders issued by the Defendant Westergren in connection with the suit brought by the Utility Board are unlawful and nonjudicial, and illegally restrain the Petitioner and the former councilmen's liberty and personal freedoms. Likewise, the illegal nonjudicial restraint on the City of Robstown deprives the Petitioner, his clients and all the citizens of Robstown of their right to a republican form of government. The permanent restraint,

the contempt citations and the contempt orders issued by the Defendant Westergren are not orders to be addressed by the Texas courts in the normal course of appeal, but rather comprise the evidence of the unlawful nonjudicial acts complained by the Petitioner on behalf of his clients.

On November 30, 1989, the United States District Court for the Southern District of Texas, Hayden W. Head, Jr., Judge presiding, denied the preliminary injunction and held that the judge was acting within the breadth of the court, and Plaintiffs appealed. The Fifth Circuit denied an injunction pending appeal, and on December 1, 1989, the Defendants proceeded with a contempt action against the former councilmen and city attorney. The Defendant Westergren found the former councilmen "not guilty" but made an initial finding of "guilty" on the city attorney, Petitioner herein. In the meantime, a panel for the 5th Circuit had granted expedited appeal and ordered briefs to be filed immediately. Over 8 months later, on August 14, 1991, another panel comprised of Barksdale, Higginbotham, and Smith of the Fifth Circuit Court of Appeals, held that the appeal had been rendered moot by the Texas state court order of

contempt. No review was made of the appellants' substantive complaints that the permanent restraint, the contempt citations, the contempt proceeding and order of contempt merely comprised the evidence of the continuing unlawful nonjudicial acts of the Defendant judge against the former councilmen, city attorney and indeed the entire City of Robstown. Instead, the new panel for the 5th Circuit dismissed the appeal and declared that Defendants were entitled to an award of attorneys fees and double costs for frivolous appeal. The panel of the Fifth Circuit denied the Motion for Rehearing on September 12, 1990 and the mandate issued 7 days thereafter.

As a consequence of the 5th Circuit's ruling, the Petitioner herein continues to be subjected by the Defendant Westergren to false imprisonment through issuance of contempt citations. On November 16, 1990, the Defendant Westergren issued another contempt citation against Petitioner to appear before visiting judge, Defendant Lewis. When the Petitioner asserted his rights that their actions were unlawful and nonjudicial through the filing a motion for leave to file Writ of Mandamus with the Texas Supreme Court, the Defendant Lewis summoned

the Nueces County Sheriff's department and the Texas Rangers to seek and arrest Petitioner. Nonetheless, following the overruling of the requested relief by the Texas Supreme Court on January 30, 1991, without opinion, the Defendant Lewis withdrew the warrant and re-set the contempt proceeding for February 20, 1991. On that date, another visiting state district judge, Defendant Garza, appeared and presided over the contempt hearing finding the Petitioner "guilty" of contempt and assessed 60 days in jail to begin on March 22, 1991. The Defendant Garza further ordered the grievance committee to conduct disciplinary proceedings based the Petitioner for the alleged contempt finding.

On March 6, 1991, the Petitioner on behalf of the Appellants and himself filed a Motion to Recall Mandate with the 5th Circuit Court of Appeals based on a miscarriage of justice. The Defendant/Appellees did not file a response. The Court of Appeals denied the Motion to Recall Mandate without opinion on March 18, 1991.

On March 15, 1991, the Petitioner on his own behalf, filed a separate civil rights action and pendent state

claims against state district court judges and state appellate court judges for injunctive relief and damages. An application for preliminary injunctive relief was also filed and a hearing was set for March 21, 1991 at 3:00 p.m. The Petitioner complained of the permanent restraining orders and other orders issued by the Defendant Judge Westergren and the other defendant judges in connection with the suit and other actions brought by the utility board that extend to the Petitioner, and which proximately caused the assessment of 60 days in jail with incarceration to begin on March 22, 1991, continues to submit the Petitioner false imprisonment. The Petitioner complained that the permanent restraint and the other orders issued by the Defendants amount to continuing unlawful nonjudicial acts that permanently restrains the Petitioner's liberty, property, legislative immunities, and other personal freedoms, including but not limited to the right of a republican form of government and false imprisonment.

Meanwhile, the Federal District Court in Cause No. C-89-334, *Garza, et al v. Westergren, et al*, had scheduled the hearing on March 18, 1991 at 1:30 p.m. for attorneys' fees and double costs as ordered by the Fifth

Circuit. Shortly prior to the hearing, the Plaintiffs filed a Renewed Application For Preliminary Injunction, Objections to Mandate of the Fifth Circuit and Clarification on Hearing for Preliminary Injunction showing a miscarriage of justice by the federal district and appellate courts and asserting that any delay continues to cause immediate and irreparable harm. A few minutes prior to the hearing in the district court for attorneys' fees and costs, the Fifth Circuit denied the Motion to Recall Mandate.

The Federal District Court then denied the Plaintiffs' subsequent request for preliminary injunction and dismissed the Plaintiffs' case against the Defendants based on the mandate of the Fifth Circuit. The Judge also awarded approximately $13,000 attorneys' fees to the attorney for the Defendant Roy Gutierrez and $3,000 attorneys fees to the attorney for the Defendant Judge.

Finally, on March 21, 1991, after a hearing for temporary restraining order requested by the Petitioner against the state court judges to enjoin them from continuing to violate the mandate of the Texas Supreme Court and subjecting Petitioner to false imprisonment, the federal district court again denied Petitioner all

relief—again basing his decision on the prior mandate of the 5th Circuit. Consequently, the Petitioner has been left with no other adequate remedy to restrain the defendant state court judges from unlawful nonjudicial acts based on the refusal of the 5th Circuit to recall its mandate.

VI. SUMMARY OF ARGUMENT

As a result of the prior opinion and subsequent order entered by the Fifth Circuit denying the Motion to Recall Mandate and the decisions of the federal district court, all in violation of the law as mandated by the Texas Supreme Court in *Guadalupe Blanco River Authority v. City of San Antonio, supra*,the Petitioner, his clients, and all of the citizens of Robstown have been subjected to continuing unlawful nonjudicial acts. There exists no other adequate remedy to restrain the defendant state judges nor to recall the mandate of the 5th Circuit. Consequently, a miscarriage of justice has occurred upon which any delay causes grave and irreparable harm. The federal district and appellate courts disregarded the mandate of the Texas Supreme Court and violated the duty to restrain prima facie violations of the

law which are causing the Plaintiffs, their attorney and all the citizens grave and irreparable harm.

The federal district and appellate Courts are subjecting the Petitioner and his clients to deprivation of their liberty, property, rights, privileges and immunities in violation of the right of access to courts to complain of the Defendant judges unlawful nonjudicial acts; in violation of due process that requires fair play and substantial justice in the execution of the law as mandated by the Texas Supreme Court in *Guadalupe Blanco River Authority v. City of San Antonio*, and the duty to restrain prima facie violations of the law.

The mandate of the Fifth Circuit constitutes a means of defeating this Court's appellate jurisdiction preventing any effective review through the ordinary course of appeal. Consequently, the actions and omissions of the courts below amount to both an abuse of judicial power and abnegation of judicial duty.

VII. REASONS FOR GRANTING THE WRITS

While the consequences of the actions taken by the state court judges are sufficiently evident of the "rarest of settings" which involve issues of exceptional character

and of great public importance to merit consideration by this Court to act upon and confront by means of a supervisory writ, the most compelling reason is the fact that the 5th Circuit Court of Appeals has defeated any means of redress whatsoever to prevent a *de facto* government from continuing to usurp the powers of the governing body which *Robs* the *Town* from all of its citizens. Furthermore, unless this Court acts immediately upon Petitioner's request for relief, the Defendant judge who created such a de facto government will ultimately be successful in acting out of personal motivation to use his judicial office as an offensive weapon to vindicate his personal objectives.

The question of whether a judge could even express an opinion on the merits of whether a utility board could sue to declare that it could be a governing body existing alongside a city council could never again be addressed following the clear mandate of the Texas Supreme Court in *Tuttle v. Guadalupe-Blanco River Authority*, 174 S.W.2d 589 (Tex. 1943), which opinion was again affirmed in *Guadalupe-Blanco River Authority v. City of San Antonio*, 200 S.W.2d 989, 1000 (Tex. 1947). While the Texas Supreme Court itself stated that they would "not

consider it proper . . . to express an opinion on its merits," and therefore declined to do so in the 1943 opinion, the Defendant state district judge along with the state appellate judges have not only rendered such an opinion, but they have enforced a clearly illegal nonjudicial mandate by means of their judicial offices through threats of incarceration—threats that will become reality real soon unless this Honorable Court acts! While the threat of incarceration is certainly more direct towards the Petitioner, the City of Robstown faces near bankruptcy through the loss of its revenues derived from the ownership and operation of its own utility systems.

The clear mandate of the Texas Supreme Court had prevented, or rather prohibited, any judge from ever considering such a question of a utility board's power to sue. However, the question has arisen in collateral issues before. Indeed the 13th Court of Appeals in Texas had previously addressed the fact that the city council is the only governing body, and that the utility board is but a mere agent of the city council, *Garza v. City of Robstown*, 483 S.W.2d (Tex.App.-Corpus Christi, 1972). Likewise, the 5th Circuit had previously stated that the

mere recognition of a utility board as a governing body would usurp the powers of the city council, *Byrd v. City of San Antonio*, 587 F.2d 184 (1979).

By its mandate, the 5th Circuit has not only allowed a situation to exist in Robstown that is clearly and arbitrarily in disregard on the Texas Supreme Court mandate, but has thus compounded a violation of the law by allowing a judge to act when the judicial machinery cannot even be invoked and yet subjecting the Petitioner to imprisonment—a false incarceration! In *Harper v. Merckle*, 638 F.2d 848 (1981) cert. denied, 454 U.S. 816 (1981), the Court held that when no party has invoked the judicial machinery for any purpose at all, then the judge's acts do not amount to judicial acts. In the instant case, the judges were and are prohibited from acting or from performing normally judicial functions because the Texas Supreme Court ordered that the members of the utility board were and are without lawful authority to bring any action. The analysis of the judges' actions should center around the mandate of the Texas Supreme Court in *Guadalupe Blanco River Authority v. City of San Antonio* in order to determine that the defendant judges' acts do not amount to judicial acts and are

therefore unlawful. Clearly, the federal district and appellate court judges wrongfully refused jurisdiction on the grounds that the defendant judges were acting within the breadth of the courts. In addition, the Fifth Circuit's holding that the complaints of the unlawful nonjudicial acts committed by the defendant judges were moot because the judges have entered the orders and the events have occurred, perpetuates the continuing unlawful nonjudicial restraints against the Petitioner and deprives him and his clients of their liberty and personal freedoms.

This is, as demonstrated herein, an extraordinary case, calling for the exercise of this Court's supervisory powers. e.g., *Schlagenhauf v. Holder*, 379 U.S.104, 111-12; *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 254-55 (1957). See generally *Comment, Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harvard Law Review 595 (1973).

Mandamus is an extraordinary remedy reserved for really extraordinary causes and exercisable then only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Jones v. Gasch*,

404 F.2d 1231, 131 U.S. App. D.C., 254, *certorari denied* 88 S.Ct. 1414, 390 U.S. 1029, 20 L.Ed.2d 286. Mandamus lies to compel a judge to exercise jurisdiction when wrongfully refused. *Woolf v. Reeves*, 65 F.2d 80. In the instant case the writs are requested to confine the judges of the inferior courts to a lawful exercise of its prescribed jurisdiction and to comply with the mandate of the Texas Supreme Court in *Guadalupe Blanco River Authority v. City of San Antonio.* The writs are also requested to compel the judges of the inferior courts to exercise their authority and comply with the duty to restrain prima facie violations of the law by the Defendant members of the state judiciary, and which violations do not amount to judicial acts.

The writs are requested to compel the judges of the inferior courts to exercise jurisdiction wrongfully refused and in disregard of the mandate of the Texas Supreme Court. The judges of the lower courts may be ordered not to disregard the mandate of the Texas Supreme court. "An attempted exercise of discretion so expansive as to drive out the law cannot be sustained." *In re Mark Industries*, 751 F.2d 1219 (CA Fed, 1984). In no event can the judges of the lower court arbitrarily disregard the

plain mandate of Texas Supreme Court in *Guadalupe Blanco River Authority v. City of San Antonio.*

Such extraordinary circumstances justified the authority of the Judges of the Fifth Circuit Court to recall their mandate based on a miscarriage of justice which is causing grave and irreparable harm to the Petitioner, his clients and all the citizens of Robstown, Texas.

Additionally, the Judges of the lower courts violated the duty to restrain the Defendant judges' unlawful nonjudicial acts, which constitute prima facie violations of the law. The courts below had the duty mandated by law—as expressed in *Rattikin Title Co., v. Grievance Committee*, 272 S.W.2d 948 (Tex.Civ.App.-Fort Worth 1954), that the mandatory duty of any court

> "[i]n an injunction case wherein the very acts sought to be enjoined are acts which prima facie constitute the violation of expressed law, the status quo could never be a condition of affairs where the respondent would be permitted to continue the acts constituting that violation. In such instances, the status quo to be preserved by temporary injunction is the last, actual, peaceable, noncontested status which preceded the pending controversy, and when it is determined that the law is being violated it is the province and the duty of the court to restrain it. And in such instances, if the preservation of the status quo should accomplish the objective of the suit this is nevertheless as it should be, for no man may engage in actions in violation of the statutory law, or of a rule of law having similar force and authority.

In the instant case, the extraordinary circumstances are awesome in their implications and this Court has the duty to unleash immediate injunctive relief against the Defendant state court judges in order to release the Petitioner and his clients from continuing false imprisonment and prevent any further irreparable harm and damage from any deprivation of constitutional rights, privileges and immunities.

Consequently, the refusal of the judges of the Fifth Circuit to recall their mandate and the lower court judges' wrongful refusal to take jurisdiction, the arbitrary disregard of the mandate of the Texas Supreme Court, and violation of the duty to restrain prima facie violations of the law, are causing the petitioner grave and irreparable injury and damage and constitute a miscarriage of justice. *Ci[illegible]X, Inc. v. Hall*, 300 F.2d 265.

Kuwait has been freed and now is time to free Robstown from the Defendant judges' unlawful nonjudicial restraint that *robs* the *town* of its local self government through acts of subversion and aggression. This certainly is the case of the century.

CONCLUSION

WHEREFORE, the said Juan Perales, seeks aid of this Honorable Court and respectfully requesting, prays:

1. That this Honorable Court grant a writ of mandamus, prohibition, or injunction to compel the Honorable Barksdale, the Honorable Higgingbotham, the Honorable Smith, Circuit Judges of the Fifth Circuit Court of Appeals, and the other judges and officers of the United States Court of Appeals for the Fifth Circuit, to recall the mandate in Cause No. 89-6311 from appeal of interlocutory order.

2. That this Honorable Court grant a writ of mandamus, prohibition or injunction against the federal Judges complained herein to compel them to take jurisdiction of the appeal and complaints filed by the Petitioner herein on behalf of his clients and himself and remand for further proceedings on the merits as may be appropriate.

3. That this Honorable Court grant a writ of mandamus, prohibition or injunction against the Defendant state court judges immediately to restrain prima facie violations of the law that do not amount to judicial acts pending further order of the Court herein.

4. That this Honorable Court grant a writ of mandamus, prohibition or injunction against the Defendants pending trial on the merits, and to enjoin them from continuing unlawful nonjudicial acts.

5. That this Honorable Court grant to the Petitioner such other and further relief as may be just in the premises.

Respectfully submitted

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AFFIDAVIT

Juan Perales, being duly sworn, deposes that he is the counsel for Appellants in Cause No. 89-6311, *Garza et al v. Westergren, et al*, 908 F.2d 27 (5th Cir. 1990) and also the Plaintiff in a separate civil rights action, filed *pro se*, in Cause No. 91-60, styled *Perales v. Westergren, et al.*, in the Federal District Court, Southern District of Texas, Corpus Christi Division; and the Petitioner herein; that he has read the foregoing petition and that to the best of his information and belief the facts therein stated are true and correct.

JUAN PERALES

SUBSCRIBE AND SWORN to before me, on this 21st day of March, 1991, to certify which witness my hand and seal of office.

SANDRA SANTOS

APPENDIX OF EXHIBITS

Ruben GARZA, Miguel Leal and Cruz Gonzalez, Jr., Plaintiffs-Appellants,

v.

Honorable Mike WESTERGREN, et al., Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before HIGGINBOTHAM, SMITH and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

This appeal is of an order issued by the District Court for the Southern District of Texas, denying a preliminary injunction. Two of the appellees move to dismiss this appeal and for an award of attorney's fees and double costs, contending that the appeal has been rendered moot by a Texas state court order of contempt entered December 5, 1989. We agree, DISMISS the appeal and award attorney's fees and double costs.

I.

Appellants are former members of the City Council of Robstown, Texas. During their tenure, the City of Robstown filed suit against the Robstown Utility Systems Board of Trustees (Board) to prohibit Board members

from misapplying public funds in contravention of city, state and federal law. The Board counterclaimed to invalidate certain city ordinances.

The Texas state court, appellee Judge Westergren presiding, found in favor of the Board, and among other relief, enjoined the City of Robstown from interfering with the management and control of the utility system. The Texas Court of Appeals affirmed. On August 22, 1989, the Board filed a motion for contempt in the state court against appellants and their attorney, Juan Perales (Perales), alleging that they had violated the injunction. (Perales represents appellants here as well).

After several continuances, the contempt hearing was scheduled for December 1, 1989; and appellants unsuccessfully attempted to obtain relief in Texas state courts to prevent the hearing. Therefore, on November 28, 1989, appellants filed a complaint in United States District Court against Judge Westergren, the City of Robstown, Julio Garcia, Mayor of Robstown, and Roy Gutierrez, superintendent of the utility systems department of Robstown, seeking, inter alia, to enjoin Judge Westergren from holding the hearing on the contempt

allegations. The complaint also sought additional relief under 42 U.S.C. §1983.

The district court denied the injunction on November 30, 1989, finding that an injunction "would not aid this Court in its jurisdiction but would instead interfere with [Texas] 214th District Court in its efforts to determine the breadth and meaning of its own order and final decision." Later that day, appellants filed in this court an appeal of the district court's order; and on December 1, 1989, this court affirmed the denial of relief. By separate order that same day, this court denied appellants' motion for stay pending application for a writ of certiorari to the Supreme Court.

On December 1, 1989, Judge Westergren proceeded with the contempt hearing; and by order dated December 5, 1989, determined that appellants, aided and abetted by their legal counsel, violated the injunction. But only appellants' counsel, Perales, was held in contempt. Appellants were not held in contempt, because the court found that their actions had been taken in reliance upon advice of legal counsel.

On December 11, 1989, appellants filed the appeal in

issue with this court, requesting the same relief as in their previous November 30 appeal (the notices of appeal are virtually identical). On April 26, 1990, this court denied appellants' motion for an injunction pending appeal and granted their motion to expedite the appeal once all briefs were on file.

Appellees assert that the appeal is moot because the state court, by not finding appellants in contempt, granted appellants all the relief they sought in that aspect of their district court action by which they sought to enjoin the contempt hearing. (As stated earlier, appellants also sought additional relief in their complaint based on § 1983.)

Appellants respond that they complain "not only of the prosecution of the contempt action by the Board, but that the recognition and existence of the Board as a governmental entity and its exercise of governmental functions, deprives the Plaintiffss of their constitutional rights . . .[T]he inunctive relief request by the Appellants to restrain continuing unlawful acts fo the Defendants is not moot because of the Defendant Westergren's actions and findings on the contempt proceeding." Appellants

contend that under Texas law, the state court was without authority or jurisdiction to consider or maintian the counterclaims filed by the Board.

The only issue decided by the district court was to deny the injunction to stay the contempt proceeding; therefore, that is the sole issue for appeal. Because the contempt proceeding has occurred, this appeal is moot. *Marilyn T., Inc. v. Evans*, 803 F.2d 1383 (5th Cir.1986).

Futhermore, this exact issue was on appeal before this court, and was denied, on December 1, 1989.

Acordingly, appellees' request for an award of attorney's fees and double costs pursuant to Federal Rule of Appellate Procedure 38 is proper, because this appeal is frivolous. FRAP Rule 38; *Pillsbury Co. v. Midland Enterprises, Inc.*,904 F.2d 317, 318 (5th Cir.1990). Further, we find that 28 U.S.C. §1927 is applicable.* *Corpus Christi Taxpayer's Assn. v. City of Corpus Christi*, 858 F.2d 973, 977 (5th Cir.1988), cert. denied, ___ U.S.___, 109 S.CT. 2064, 104 L.Wd.2d 629 (1989). Appellees are therefore entitled to an award of such fees, expenses and costs under Rule 38 and § 1927, including against Perales personally for the unreasonable and

vexatious multiplication of this proceeding by this appeal (second) to this court.

IT IS ORDERED that the motions to dismiss the appeal are GRANTED. We REMAND for further proceedings on the merits as may be appropriate. *Marilyn T.*, 803 F.2d at 1385.

IT IS FURTHER ORDERED that the motions for an award of double costs and attorney's fees are GRANTED, and we REMAND for a determination of the attorney's fees and other expenses reasonably incurred by appellees by virtue of this appeal. Double costs of the appeal are also assessed. The district court shall enter judgment against appellants and Perales for such fees, expenses and costs and shall apportion the amounts awarded between appellants and Perales. *Pillsbury*, at 318; Corpus Christi, 858 F.2d 978.

*28 U.S.C. § 1927 provides that "[a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

No. 89-6311

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RUBEN GARZA, MIGUEL LEAL, and
CRUZ GONZALEZ, JR.,
Plaintiffs-Appellants,

versus

MIKE WESTERGREN and ROY GUTIERREZ
Defendants-Appellees

and

CITY OF ROBSTOWN and JULIO GARCIA
Defendants

MOTION TO RECALL MANDATE

COME NOW the Appellants/Plaintiffs, by and through the undersigned counsel, and bring forth this motion, pursuant to F.R.A.P. 27 and Local Rule 41.2, to have this Court recall its previously issued mandate based on a miscarriage of justice, and in support of this motion the Appellant would show unto the Court the following:

I.

CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record for Appellants, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13(a).

1. Ruben Garza, Miguel Leal and Cruz Gonzales, Jr. are the Plaintiffs below and Appellants herein. All the appellants were former members of the city council for the City of Robstown when the City's Utility Board illegally filed suit against the City of Robstown and the contempt action against the Appellants. Juan Perales, the attorney for the appellants herein, was the city attorney at the time the suit by the City's Utility Board was filed against the City.

2. The Defendants below and Appellees herein are: the Honorable Mike Westergren, 214th District Court Judge, Nueces County, Texas and Roy Gutierrez, superintendent of the utility board and employee for the City of Robstown.

3. The City of Robstown and Julio Garcia, its Mayor, were Defendants below, but did not file an answer nor participate in the trial below wherein the District Court denied the Plaintiffs' request for preliminary injunction. Moreover, the City of Robstown and Julio Garcia have not asserted an interest nor participated in the appeal of the denial of Plaintiffs' request for preliminary injunction. Their non-participation and failure to response

should be deemed an admission as to the nonjudicial acts of the Defendant Westergren.

JUAN PERALES, JR.
Attorney for Appellants

II.

1. This Court's decision and judgment in the above styled appeal of an order denying preliminary injunction was entered on August 14, 1990, and the mandate issued forth on September 12, 1990.

2. In this Court's panel opinion officially reported in *Garza v. Westergren*, 908 F.2d 27 (5th Cir. 1990), this Court stated that the "only issue decided by the district court was to deny the injunction to stay the contempt proceeding; therefore, that is the sole issue for appeal. Because the contempt proceeding has occurred, this appeal is moot." at 29. Consequently, this Court dismissed the appeal. Yet, the panel opinion is in effect a determination not only of the appeal of an interlocutory order, but of the merits of the Plaintiffs/Appellants' entire case. This is so because this Court, as did the District Court, recognized the Defendant state district judge's contempt proceeding as a judicial act. However,

the gravamen of the Appellants' complaint is that the state judge Westergren is committing acts that are non-judicial acts, as a matter of law, because no lawful party had invoked the judicial machinery as to allow the issuance of his purported judgment, show cause order, and subsequent contempt proceeding. In other words, the relief requested by the Plaintiffs is not merely to stay the contempt proceeding, but rather to enjoin the state district judge from committing any nonjudicial acts which were manifested by the purported judgment and subsequent contempt proceeding.

3. The effect of this Court's conclusion and acceptance of the Appellees' argument that "the appeal is moot because the state court, by not finding appellants in contempt, granted appellants all the relief they sought in that aspect of their district court action" implicitly recognizes and approves such contempt proceeding, as well as the entry of the state court judgment on which the contempt was based, as judicial acts. To recognize any of these actions as judicial acts, the Court would have to first find or presume that they were committed subsequent to the invocation of the judicial machinery. Upon

cursory review of the panel's opinion, it leaves the Appellants' basis for their contention as an incomplete assertion by stating at p. 28, that "Appellants contend that under Texas law, the state court was without authority or jurisdiction to consider or maintain the counterclaims filed by the Board." The panel's opinion should have concluded by stating "because the judicial machinery could never be invoked," based on *Guadalupe Blanco River Authority v. City of San Antonio*, 200 S.W.2d 989, 1000 (Tex. 1947). Consequently, even by dismissing the Plaintiffs' appeal, this Court has ruled on the issue of whether the state judge's actions are to be recognized as judicial actions without consideration of the fact that the judicial machinery was never invoked. Remanding the case for further consideration on the merits is futile to the Appellants, the issue having been decided by this Court while leaving the Appellants with no recourse for consideration by appeal to this Court or by certiorari to the Supreme Court. Thus, the panel's opinion not only has a direct impact on the decision of the district court regarding the question of the state district judge's actions as judicial, it has further interfered with any

appellate jurisdiction for review in establishing the law of the case on the most essential issue—acting without the invocation of the judicial machinery, a situation clearly in violation of the law as set out by this Court in *Harper v. Merckle*, 638 F.2d 848 (1981) cert. denied, 454 U.S. 816 (1981)

3. The further effect of the panel's opinion is to allow the Defendant state district judge to continue to commit nonjudicial acts by enforcing the permanent injunction not only on the Appellants, but as further shown herein, on their attorney of record in the state court [which this Court has already recognized to be the undersigned counsel herein], and even more expansively, on the entire City of Robstown and its citizens. To state that the Appellants have obtained all of their relief is not only perfunctory, but it fails to recognize that the state district judge continues to commit nonjudicial acts because the judicial machinery has never been invoked. The nonjudicial actions are manifested through his rendering and enforcement of the purported judgment which affect not only the undersigned counsel, but served to penalize the Appellants for seeking redress of their com-

plaint of his nonjudicial actions, as well as enforcing an illegal restraint on the City of Robstown. To be sure, the state judge's purported judgment continues to be a perpetual illegal restraint on the Appellants, as well as the undersigned counsel and the City of Robstown, permanently subjecting them to further false arrest and false incarceration for purported contempt upon any action considered to be violative of such orders. In essence, the state district judge continues to act when no lawful party has invoked the judicial machinery.

4. Based on the panel's opinion and recognition of the state judge's actions as judicial, the state judge proceeded to issue another show cause order for contempt on the undersigned counsel. In fact, the undersigned counsel was subsequently found guilty of contempt on February 20, 1991 for violating the purported judgment, and assessed 60 days in jail. Hence, the *Harper v. Merckle* situation has continued to be created by the District Court's and this Appellate Court's failure to enjoin prima facie violations of the law. The personal freedom and liberty of the Plaintiffs/Appellants and their attorney clearly are at stake as a result of the continuing

nonjudicial acts of the Defendant Westergren and manifest a miscarriage of justice. See *Harper v. Merckle*, supra. As important, the illegal restraint of the city by the Defendant Westergren which amounts to a nonjudicial act deprives the Plaintiffs, their attorney and all the citizens of the City of Robstown of their rights, privileges and immunities. As a result of the purported judgment issued by this Court, the deprivation of the property of the Appellants/Plaintiffs and their attorney is also at stake which likewise clearly manifests a miscarriage of injustice.

5. An appellate court has the power to correct a judgment on an interlocutory appeal at any time before a final judgment is entered. *John Simmons Co. v. Grier Bros. Co.* 258 U.S. 82, 66 L. Ed. 475, 42 S. Ct. 196 (1922), motion den 259 U.S. 576, 66 L. Ed. 1071, 42 S. Ct. 585. The power to recall and reform a mandate even after issuance is well established, and no motion is required for the appellate court to hear or rehear a cause en banc. See *Sparks v. Duval County Ranch Co., Inc.* 604 F.2d 976 (5th Cir. 1979), cert. denied, 445 U.S. 943

(1980), 449 U.S. 1021 (1980); aff'd sub nom. *Dennis v. Sparks*, 449 U.S. 24 (1980).

6. This motion should be granted in order to prevent further injustice that the public interest dictates. *American Iron & Steel Inst. v. E.P.A.*, 560 F.2d 589, 598 (3rd Cir. 1977).

7. In *Rattikin Title Co., v. Grievance Committee*, 272 S.W.2d 948, 955 (Tex.App.-Fort Worth 1954), the court stated the basic mandatory duty of any court "[i]n an injunction case wherein the very acts sought to be enjoined are acts which prima facie constitute the violation of expressed law, the status quo could never be a condition of affairs where the respondent would be permitted to continue the acts constituting that violation. In such instances, the status quo to be preserved by temporary injunction is the last, actual, peaceable, noncontested status which preceded the pending controversy, and when it is determined that the law is being violated it is the province and the duty of the court to restrain it. And in such instances, if the preservation of the status quo should accomplish the objective of the suit this is nevertheless as it should be, for no man may

engage in actions in violation of the statutory law, or of a rule of law having similar force and authority." In the instant case, the continuing nonjudicial acts of the defendant Westergren are in violation of the law that prohibits the city's utility board from invoking the judicial machinery; and the continuing exercise of any actions related to the utility board's suit are nonjudicial and likewise in violation of the law. The actions or judgment of the Court of Appeals amount to a violation of the duty to restrain prima facie violations of the law.

WHEREFORE, the Appellant/Plaintiffs respectfully request that in order to prevent a further miscarriage of justice that the Court recall its previously issued mandate in this appeal of an interlocutory order on preliminary injunction requested by the Plaintiffs.

Respectfully submitted

JUAN PERALES, JR.
Federal I. D. No. 4595
Attorney for Appellants
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(512) 387-9808

TUTTLE et al. v. GUADALUPE-BLANCO RIVER AUTHORITY et al.
No. 16180
Supreme Court of Texas
Oct. 27, 1943

CRITZ, Justice.

At a former day in this term of court we "Refused For Want of Merit" application for writ of error No. 27098, filed by the above named respondents. Such application for writ of error is now before us on motion for rehearing filed by the petitioners in the application. Such motion is No. 16180.

We "Refused For Want of Merit" the application for writ of error in this case because we were of the opinion that the Court of Civil Appelas correctly held that the plaintiffs who brought this suit in the district court were, and are, without lawful authority to bring or maintain it, we do not consider it proper for us to express an opinion on its merits. We therefore do not do so.

It is ordered that the motion for rehearing above mentioned be, and the same is hereby, overruled.

Dated: October, 27, 1943.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

RUBEN GARZA,	§	
MIGUEL LEAL,	§	
CRUZ GONZALES, JR.	§	
Plaintiffs	§	CIVIL CAUSE NO. C-89-334
VS.	§	
	§	
MIKE WESTERGREN,	§	
JULIO GARCIA,	§	
ROY GUTIERREZ,	§	
Individually	§	
and in Their Official	§	
Capacity,	§	
CITY OF ROBSTOWN	§	
Defendants	§	

RENEWED APPLICATION FOR PRELIMINARY INJUNCTION, OBJECTIONS TO MANDATE OF THE CIRCUIT COURT OF APPEALS AND CLARIFICATION ON HEARING FOR PRELIMINARY INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, RUBEN GARZA, MIGUEL LEAL, and CRUZ GONZALES JR., by and through their counsel of record, Movants herein, and request that this Court reconsider their Renewed Application For Preliminary Injunction, to consider their Objections to the hearing for attorney fees and double costs as mandated by the U.S. Fifth Circuit Court of Appeals, and Clarification of the hearing for preliminary injunction held on November 28, 1989, and in support thereof would show a miscarriage of justice, and immediate and irreparable harm as follows:

I.

The U.S. Fifth Circuit Court of Appeals entered a decision and judgment of an appeal from this Court of an interlocutory order denying preliminary injunction on August 14, 1990 and the mandate issued forth on or about September 17, 1990. The Fifth Circuit Court stated in its opinion officially reported in *Garza et al v. Westergren et al*, No. 89-6311, 908 F.2d 27 (5th Cir. 1990),

> "Ordered that the motions to dismiss the appeal are GRANTED. We REMAND for further proceedings on the merits as may be appropriate. IT IS FURTHER ORDERED that the motions for an award of double costs and attorney's fees are GRANTED, and we REMAND for a determination of the attorney's fees and other expenses reasonably incurred by appellees by virtue of this appeal. Double costs of the appeal are also assessed. The district court shall enter judgment against appellants and Perales for such fees, expenses and costs and shall apportion the amounts awarded between appellants and Perales. (citations omitted)."

The Fifth Circuit Court concluded that the "only issue decided by the district court was to deny the injunction to stay the contempt proceeding; therefore that is the sole issue for appeal. Because the contempt proceeding has occurred, this appeal is moot."

II.

A Motion to Recall Mandate was filed by the Plaintiffs herein and Appellants in the Fifth Circuit Court based on a miscarriage of justice. The gravaman of the Motion to Recall Mandate is that the Defendant/Appellee state court judge is unlawfully acting in his official capacity and that his unlawful act does not amount to a judicial act because the city's utility board is not a lawful party and could never invoke the judicial machinery and that therefore, such nonjudicial act is unlawful. *Guadalupe Blanco River Authority v. City of San Antonio*, 200 S.W.2d 989, 1000 (Tex. 1947). The relief requested by the Plaintiffs in their Application For Preliminary Injunction is not merely to stay the contempt proceeding, but rather to enjoin the state district judge from committing any further unlawful act, which act is manifested by the purported judgment and subsequent contempt proceeding, and which does not amount to a judicial act. *Harper v. Merckle*, 638 F.2d 848 (1981) cert. denied, 454 U.S. 816 (1981).

III.

The effect of the panel's opinion and mandate is that it allows the Defendant state district judge to continue unlawfully acting in the judicial capacity and allows him to continue to commit unlawful nonjudicial acts by enforcing the permanent injunction issued by him—acts that do not amount to judicial acts which are committed not only on the Plaintiffs/Appellants, but on their attorney as well [the undersigned counsel], and even more expansively, on the entire City of Robstown and its citizens. To be sure, the state judge's purported judgment continues to be a perpetual illegal restraint on the Plaintiffs/Appellants, as well as on the undersigned counsel and the City of Robstown. The permanent injunction is permanently subjecting the Plaintiffs/Appellants and counsel herein to further false arrest and false incarceration and further deprivations of personal freedoms.

IV.

Based on the panel's opinion and mandate, the state judge continues to unlawfully act in his official capacity

and has proceeded to issue another show cause order for contempt on the undersigned counsel—again an act that does not amount to a judicial act. The undersigned counsel was subsequently found guilty of contempt on February 20, 1991 for violating the purported judgment, and assessed 60 days in jail. Hence, the *Harper v. Merckle* situation has continued to be allowed by this Court's and the Appellate Court's failure to enjoin prima facie violations of the law committed by the Defendant judge by unlawfully acting in the official capacity and in a non-judicial manner. The personal freedoms and liberty of the Plaintiffs/Appellants and their attorney clearly are at stake as a result of the continuing unlawful nonjudicial acts of the Defendant Westergren and manifest a miscarriage of justice. The illegal restraint of the City of Robstown by the Defendant Westergren that amounts to a nonjudicial act deprives the Plaintiffs, their attorney and all the citizens of the City of Robstown of their rights to a republican form of government. As a result of the judgment and mandate issued by the U.S. Fifth Circuit Court of Appeals, the deprivation of the

property of the Plaintiffs and their attorney is also at stake which likewise clearly manifests a miscarriage of justice. Attached hereto as Exhibit A is Motion to Recall Mandate filed in the U.S. Fifth Circuit Court of Appeal on March 6, 1991.

V.

The Plaintiffs/Appellants after consultation with Mr. Barry Stiebing, from the Office of the Clerk of the Fifth Circuit Court of Appeals, and after illustrating a state of emergency, also filed by telecopier a Request to Expedite Submission of the Motion to Recall Mandate on March 8, 1991. Attached hereto as Exhibit B is the Request for Expedited Submission. The Plaintiffs/Appellants emphasized the permanent injunction, the citation orders and contempt orders which evidence the continuing unlawful nonjudicial acts of the Defendant Westergren, and which are causing grave and irreparable harm to the Plaintiffs, their attorney and all the citizens of the City of Robstown. Any delay continues to cause grave and irreparable harm.

VI.

The Office of the Clerk of the U.S. Fifth Court of Appeals sent notice on March 6, 1991, to the Appellees Westergren and Gutierrez of the Appellants' Motion to Recall Mandate. Attached as Exhibit C is the notice sent to Darrell Barger and Tom Anson, Attorneys for Appellees Westergren and Roy Gutierrez respectively. According to the notice, "[t]his motion will be presented for ruling without oral argument on this date: March 13, 1991," and "[a]ny response to the motion must be filed by opposing counsel on or before that date to be considered in the ruling." However, the opposing counsel for Defendant Westergren and Gutierrez failed to respond to the Request for Expedited Submission and in fact, have totally failed to respond to the Motion to Recall Mandate. Therefore, the Appellees Westergren's and Gutierrez's failure to respond to the Motion to Recall Mandate should be deemed as an admission as to the complaint of the Appellants/Plaintiffs that the Defendant Westergren is unlawfully acting in his official capacity and that his unlawful acts do not amount to judicial acts. The failure

to file a response by the Appellees/Defendants herein should also be deemed that the Appellees/Defendant did not object to the request to Recall Mandate filed by the Appellants/Plaintiffs. The Defendant City of Robstown and Defendant Julio Garcia failed to respond to the Appeal filed by the Plaintiffs/Appellants. Any objections by the City of Robstown and Julio Garcia are waived and most importantly, their non-participation in the appeal should be deemed as an admission to the Plaintiffs'/Appellants' complaint to Recall the Mandate and request for preliminary injunction. Moreover, attorney's fees ordered against the Plaintiffs/Appellants and in favor of the Defendants to defend unlawful nonjudicial acts which this Court has not made a final judgment on, amounts to deprivation of the Plaintiffs' property and a miscarriage of justice. Finally, the failure to restrain the Defendant Westergren from further unlawful nonjudicial acts against the Plaintiffs, their attorney and the City of Robstown continues to cause grave and irreparable harm not only to the Plaintiffs, their attorney and the City, but to all the citizens.

VII.

This Court, as does the U.S. Fifth Circuit Court of Appeals, has the duty mandated by law—as expressed in *Rattikin Title Co., v. Grievance Committee*, 272 S.W.2d 948, 955 (Tex.App.-Fort Worth 1954), that the basic mandatory duty of any court

> "[i]n an injunction case wherein the very acts sought to be enjoined are acts which prima facie constitute the violation of expressed law, the status quo could never be a condition of affairs where the respondent would be permitted to continue the acts constituting that violation. In such instances, the status quo to be preserved by temporary injunction is the last, actual, peaceable, noncontested status which preceded the pending controversy, and when it is determined that the law is being violated it is the province and the duty of the court to restrain it. And in such instances, if the preservation of the status quo should accomplish the objective of the suit this is nevertheless as it should be, for no man may engage in actions in violation of the statutory law, or of a rule of law having similar force and authority."

In the instant case, the continuing nonjudicial acts of the defendant Westergren are in violation of the law that prohibits the City's Utility Board from invoking the judicial machinery and prohibits the judge from acting in his official capacity with the Utility Board; and the continuing unlawful acting in the official capacity in any actions

related to the Utility Board's suit are nonjudicial and likewise in violation of the law. The actions or mandate of the Court of Appeals' panel amount to a violation of the duty to restrain prima facie violations of the law and amount to a miscarriage of justice.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request this Honorable Court to grant the preliminary injunction pending the final trial on the merits and any such further relief to which Plaintiff may be entitled.

Respectfully submitted,

JUAN PERALES, JR.,
Attorney for Plaintiffs
ADMISSIONS I.D. NO.: 4595
SBN: 15770900
432 W. AVE. J
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ROBSTOWN, TEXAS 78380
512/387-9808

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Renewed Application For Preliminary Injunction, Objections To Mandate Of The Circuit Court Of Appeals And Clarification On Hearing For Preliminary Injunction was on this 18th day of March, 1991, delivered to opposing counsel.

JUAN PERALES, JR.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JUAN PERALES	§	
Plaintiff	§	
	§	
VS.	§	
	§	CIVIL CAUSE NO. 91-60
	§	
MIKE WESTERGREN,	§	
WILLIAM SEERDEN,	§	JURY TRIAL REQUESTED
HARRY LEWIS,	§	
FORTUNATO BENAVIDEZ,	§	
ROBERTO GARZA,	§	
Individually and in	§	
Their Official	§	
Capacity as State	§	
Court Judges	§	
Defendants	§	

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JUAN PERALES, hereinafter referred to as Plaintiff, and files this his Original Complaint complaining of MIKE WESTERGREN, individually and in his official capacity as Judge of the 214th District Court of Nueces County, Texas; HARRY LEWIS, individually and in his official capacity as visiting Judge of the 214th District Court of Nueces County, Texas; ROBERT GARZA, individually and in his official capacity as visiting Judge of the 214th District Court of Nueces County, Texas; WILLIAM SEERDEN, individually and in his official capacity as Appellate Judge of the 13th Court

of Appeals of the State of Texas sitting at Corpus Christi; and FORTUNATO BENAVIDEZ, individually and in his official capacity as Appellate Judge of the 13th Court of Appeals of the State of Texas sitting at Corpus Christi; and for cause of action would respectfully show unto this Honorable Court the following:

PARTIES AND RELATIONSHIPS

1. Plaintiff, JUAN PERALES, is a citizen of the United States and resident of Nueces County, Texas. Plaintiff is also an attorney licensed in the State of Texas and has his law practice in Robstown, Nueces County, Texas.

2. Defendant, MIKE WESTERGREN, is a state district judge and is named individually and in his official capacity as judge of the 214th District Court, Nueces County, Texas. Service of process may be accomplished over said Defendant by serving him at the Nueces County Courthouse, 9th Floor, 901 Leopard, Corpus Christi, Texas, 78401.

3. Defendant, HARRY LEWIS, is a state district judge and is named individually and in his official capacity as visiting judge of the 214th District Court, Nueces County, Texas. Service of process may be accomplished by serving him at the Cameron County Courthouse, Brownsville, Texas.

4. Defendant, ROBERT GARZA, is a state district judge for the 138th District Court and is named individually and in his official capacity as visiting judge of the 214th District Court, Nueces County, Texas. Plaintiff seeks only equitable preliminary injunctive relief as against this Defendant as set forth below. Service of process may be accomplished by serving him at the Cameron County Courthouse, Brownsville, Texas.

5. Defendant, WILLIAM SEERDEN, is a state appellate judge and is named individually and in his official capacity as Associate Justice of the 13th Court of Appeals at Corpus Christi, Texas. Service of process may be accomplished by serving him at the Nueces County Courthouse, 10th Floor, 901 Leopard, Corpus Christi, Texas, 78401.

6. Defendant, FORTUNATO BENAVIDEZ, is a state appellate judge and is named individually and in his official capacity as an Associate Justice of the 13th Court of Appeals at Corpus Christi, Texas. Service of process may be accomplished by serving him at the Nueces County Courthouse, 10th Floor, 901 Leopard, Corpus Christi, Texas, 78401.

7. The Defendants Westergren, Lewis, Seerden and Benavidez are hereinafter referred to as "Defendants" or specifically by name. The Defendant Garza is referred to specifically by name.

PRELIMINARY STATEMENT

8. This civil action is brought by Plaintiff for preliminary and permanent injunctive relief and to recover damages resulting from:

(a) Illegal activities prohibited by the Civil Rights Act of 1964, 42 U.S.C. §1983, et seq.;

(b) Civil conspiracy and,

(c) Tortious interference with business relations, and other causes of action.

9. This suit results from a conspiracy or scheme by Defendants to deprive Plaintiff of his liberty, property rights, privileges and immunities for discharging his duties as an attorney in private practice and as city attorney for the City of Robstown. The relief sought includes actual, compensatory, and punitive damages under state and federal law; costs of investigation and suit; interest and attorney's fees; preliminary and permanent injunctive relief; and any further relief to which plaintiff may show himself justly entitled.

JURISDICTION AND VENUE

10. This Court has jurisdiction of this action under 18 U.S.C. §§1331 and 1343; 42 U.S.C. §1983; and the principles of pendent jurisdiction.

11. Personal jurisdiction and venue in this action are predicated on 28 U.S.C. §1391(b) since all of the Defendants are residents of, or are found within, have agents within, or transact their affairs in the Southern District of Texas and Plaintiff's causes of action arose in the Southern District of Texas. All of the Defendants reside within the Southern District of Texas.

STATEMENT OF FACTS AND LAW

12. At all times material hereto, the Plaintiff has been actively engaged in the business of law as a private attorney or as the city attorney for the City of Robstown. During the Plaintiff's tenure as city attorney, the city council of the City of Robstown uncovered widespread corruption among the members of the utility board of the City of Robstown's utility systems department, their attorneys, the city's depository bank and others. The Utility Board, the bank, the attorneys and others conspired, planned, and schemed to unlawfully act in their official capacities and manipulate to their personal

benefit the city's finances from the city's utility systems revenues. Consequently, the City of Robstown brought suit on or about May 3, 1988, against the individual members of the city's utility board inter alia for misconduct in the unlawful control and expenditure of the city's finances. The City Council also uncovered that the mayor and city secretary were responsible for such misconduct. The City of Robstown also sued the bank for 3.5 million dollars for breach of their fiduciary duty.

13. The Plaintiff at all times relevant herein was the city attorney for the City of Robstown, had exercised his duty to protect and defend the City of Robstown and was acting under the direction of the city's governing body—the city council. Absolute legislative immunity extended to the Plaintiff as city attorney for the City of Robstown. *Universal Amusement Co., Inc. v. Hofheniz*, 616 F.2d 202 (5th Cir. 1980).

14. On or about May 20, 1988, the members of the utility board of the City of Robstown's utility systems department acting by and through the "Utility Board", hereinafter referred to as Utility Board, unlawfully acted and retained attorneys, Francis Gandy, Faires Wade, and Tom Anson, to file a purported counterclaim against

the City of Robstown in Defendant Westergren's 214th District Court, though prohibited by Texas law from bringing suit, *Guadalupe Blanco River Authority v. City of San Antonio*, 200 S.W.2d 989, 1000 (Tex. 1947).

15. Plaintiff would show that the Utility Board's violation of the law that prohibits them from bringing suit or any other action was directly and proximately caused by the acts and omissions of the Defendants by unlawfully acting in their official capacity in allowing the filing and maintaining of such suits or actions in state courts.

16. Upon information and belief, Plaintiff would show that the purpose of the filing of the purported counterclaim by the members of the Utility Board was to obstruct any investigation of the city's finances and to allow the Utility Board and others, with the support of the Defendant judges unlawfully acting in their official capacity, to continue with a conspiracy of unlawfully controlling and expending the city's finances. On May 23, 1988 and on several other occasions thereon, the Defendant Westergren conspired and unlawfully acted with the members of the Utility Board of the City of Robstown's utility systems and issued several orders that do not amount to judicial acts. The Defendant

Westergren unlawfully acting, entered final declaratory and injunctive orders on December 12, 1988 based on the pleadings filed by the Utility Board and denied all relief requested by the City of Robstown.

17. The City of Robstown appealed the denial of injunctive relief by the Defendant Westergren to the 13th Court of Appeals. Defendant appellate justices, Seerden and Benavidez, on or about April 11, 1989, based on the unlawful acts in the filing of a mandamus pleading in an original action brought by the Utility Board, issued injunctive orders against the city council and the Plaintiff. On or about July 3, 1989, the Defendants Seerden and Benavidez "affirmed" the purported permanent injunction and relief granted by Defendant Westergren on the pleadings filed by the Utility Board. On or about July 7, 1989, the Defendants Seerden and Benavidez ordered the Defendant Westergren to proceed with a contempt action filed by the Utility Board against the former councilmen and Plaintiff.

18. On or about December 5, 1989, the Defendant Westergren unlawfully acted and entered contempt orders against the Plaintiff alleging violation of the final declaratory and injunctive orders resulting from the suit filed by the Utility Board.

19. On or about January 16, 1991, following appointment by the Presiding Judge of the Administrative District, the Defendant Lewis unlawfully acted and caused to be issued a contempt citation against the Plaintiff as a result of a subsequent contempt action filed by the Utility Board. On or about January 28, 1991, the Defendant also unlawfully acted and caused to be issued a warrant for the arrest of Plaintiff and ordered a $50,000 bond placed on the Plaintiff. Morever, the Defendant Lewis ordered deputies from the Nueces County Sheriff's department and the Texas Rangers to seek and arrest the Plaintiff. At the request of Plaintiff, attorney Alex Luna contacted the Defendant Lewis to request him to refrain from unlawfully acting in his official capacity and for dismissal of the capias. Thereafter, the Defendant Lewis unlawfully acted and ordered attorney Luna and Plaintiff to appear at a subsequent contempt hearing that was rescheduled for February 20, 1991 to represent the Plaintiff, though the Plaintiff challenged the legal authority of the actions in the official capacity of the Defendant Lewis to order the Plaintiff or anyone else to appear on Plaintiff's behalf.

20. On February 20, 1991, the Defendant Robert Garza, as a result of the order to show cause and the injunctive orders by the Defendant Lewis and Defendant Westergren, respectively, and the orders of the Defendants Seerden and Benavidez, that do not amount to judicial acts, unlawfully acted and called for hearing the contempt action as visiting judge for the 214th District Court and caused an order to issue for incarceration of the Plaintiff. The Plaintiff did not appear at said hearing, but was allegedly represented by attorney Alex Luna upon "order" of the Defendant Lewis.

21. At all times material hereto, the members of the Utility Board and others were associated with or employed by the City of Robstown's utility systems department. The City of Robstown's utility systems department constitutes an "enterprise" within the meaning of 18 U.S.C. §1961 and 1962, which enterprise is engaged in or the activities of which affect interstate commerce within the meaning of 18 U.S.C. §1962. Upon information and belief, the Utility board, the City of Robstown's depository bank, the attorneys and others conspired, planned, and schemed to unlawfully act and manipulate to their personal benefit the city's finances

from the utility systems revenues. Upon information and belief, Plaintiff will show that the Utility Board, the bank, attorneys, and others have intended to profit enormously through their course of racketeering activity. The objective of the Utility Board, the bank, the attorneys, and others is to continue illegally acting by controlling and expending the city's finances from its utility systems' revenues.

22. Upon information and belief, the Plaintiff will show that the unlawful arranged appearance of the Utility Board before the state courts in violation of the law illustrates that the Defendants, Westergren, Lewis, Seerden and Benavidez actively worked to deprive the Plaintiff's rights, privileges and immunities for his actions taken as a practicing attorney and city attorney. Upon information and belief, the Plaintiff will show that all of these individual Defendants knew or should have known that their actions were non-judicial and were unlawful and were taken to mislead the Defendant Garza to unlawfully act with the Utility Board.

23. Moreover, upon information and belief, the Defendants Westergren, Seerden and Benavidez conspired, schemed, or planned to work with the Utility

Board and others to prevent, discourage and sabotage any investigation of the city's finances. At that time, "judicial orders" would be in place to swiftly approve any punishment against the Plaintiff by the Defendants to obstruct the Plaintiff's role in the investigation and deprive the liberty, property, rights, privileges and immunities of the Plaintiff.

24. Although all of the Defendants named herein are state court judges, the Plaintiff would show that the acts taken by the Defendants arise out of the unlawful acts in the filing and maintaining of a suit and actions by a utility board. Such acts are specifically prohibited by law, *Guadalupe Blanco River Authority v. City of San Antonio*, 200 S.W.2d 989, 1000 (Tex. 1947), and therefore the unlawful acts of the Defendants do not amount to judicial acts. *Harper v. Merckle*, 638 F.2d 848 (1981) cert. denied, 454 U.S. 816 (1981).

FEDERAL CAUSES OF ACTION

25. Plaintiff reiterates and realleges as part of this cause of action each and every allegation set forth in paragraphs 1 through 24 inclusive of this complaint with the same force and effect as if fully set forth herein.

26. As a result of the Defendants' unlawful nonjudicial actions and omissions, including the maintaining of the suits and unlawful actions filed by the Utility Board, unlawfully acted and engaged in under the pretext of color of state authority, Plaintiff has been and is being deprived of rights secured by the Constitution and laws of the United States, including, but not limited to his First Amendment right of freedom of expression, his Fifth and Fourteenth Amendment rights to be free from unlawful restraint of his liberty and other personal freedoms as well as his legislative and prosecutorial immunities, all in violation of 42 U. S. C. § 1983.

PENDENT CAUSES OF ACTION

27. Plaintiff reiterates and realleges as part of this cause of action each and every allegation set forth in paragraphs 1 through 24 inclusive of this complaint with the same force and effect as if fully set forth herein.

28. The acts and conduct hereinbefore alleged constitute false arrest and imprisonment, malicious prosecution,prima facie tort, conspiracy tort, negligence, and gross negligence under the laws of the State of Texas. As a result of said violations of his civil rights and tortious conduct of the Defendants, Plaintiff has suffered

and will continue to suffer from mental distress, humiliation, embarrassment, and defamation of character and reputation, and was and is prevented from attending his business and duties. This Court has pendent jurisdiction to hear and adjudicate these claims.

BASIS FOR EQUITABLE RELIEF

29. Plaintiff reiterates and realleges as part of this cause of action each and every allegation set forth in paragraphs 1 through 24 inclusive of this complaint with the same force and effect as if fully set forth herein.

30. Although the Defendants' actions do not amount to judicial acts, Plaintiff has sought relief before the Texas Supreme Court by filing on January 28, 1991 and February 20, 1991, a Motion and Petition for Writs of Mandamus, Prohibition and Injunction against the Defendants. The Texas Supreme Court denied the relief requested by Plaintiff, including a Motion for Rehearing, without opinion on March 6, 1991.

31. The Plaintiff also filed a complaint on behalf of former members of the city council, Ruben Garza, Miguel Leal and Cruz Gonzales, Jr., against the Defendant Westergren before this Court in Cause No. C-89-334,

styled Garza, et al, vs. Westergren, et al. The Defendant Westergren is also an appellee in Cause No. 89-6311, styled *Garza, et al vs. Westergren et al*, in the appeal of the denial of an interlocutory order to the Fifth Circuit Court of Appeals. Although this appeal was dismissed by the Fifth Circuit Court of Appeals, officially reported in 908 F.2d (5th Cir. 1990), there is presently pending before said appellate court a Motion to Recall Mandate. As of the date below, there has been no ruling from the appellate court on this motion. Consequently, has no plain, adequate, or complete remedy at law to redress the wrongs alleged herein and this suit for injunctive relief is his only means of securing adequate redress from Defendants' unlawful actions and nonjudicial acts. Plaintiff will continue to suffer irreparable injury from Defendants' intentional and nonjudicial acts set forth herein unless enjoined by this Court.

32. As a result of the continuing unlawful nonjudicial acts of the Defendants Westergren, Seerden and Benavidez, injunctive relief is necessary to restrain them from their continuing unlawful nonjudicial acts against

the Plaintiff and prevent further irreparable harm against the Plaintiff. The Plaintiff continues to be harmed by the unlawful nonjudicial acts of these Defendants. The unlawful nonjudicial acts of these Defendants also continue to subvert the local self government or city council. The unlawful nonjudicial acts of the Defendants against the Plaintiff as former city attorney, the members of the city council and the City are awesome in its implications. The city's finances continue to be robbed and continue to harm the city to near bankruptcy. The unlawful nonjudicial acts of the Defendants continue to establish two governing bodies in the City and continue to harm not only the Plaintiff, but the former and present members of the city council, the City of Robstown and its citizens. The Defendant judges in conspiracy and in unlawful nonjudicial acts with the superintendent and Utility Board and others have continued to establish the utility systems department as a governing body, subverting the city council— the city's only governing body.

33. As a direct and proximate result of the Defendants, Westergren, Lewis, Seerden and Benavidez, their continuing misconduct in the unlawful and nonjudicial acts, Plaintiff has suffered false arrest and incarceration, physical pain, injury to reputation, embarrassment, humilation and mental anguish and suffering, all to his damage in a sum of at least $50,000,000 to which Defendants are jointly and severally liable to Plaintiff.

34. Plaintiff will further show that the conspiracy, continuing misconduct and nonjudicial acts of the Defendants, as described above, were and are willful and malicious. As a result, Plaintiff is entitled to recover exemplary damages to deter such cruel and unlawful nonjudicial acts by the members of the judiciary. Accordingly, Plaintiff requests that exemplary damages be awarded against the Defendants Westergren, Lewis, Seerden and Benavidez in a sum of $50,000,000.

35. Due to the Defendants' continuing nonjudicial acts against the Plaintiff as stated above, Plaintiff has been required to act as counsel pro se to institute and prosecute this action. Plaintiff is, therefore, entitled to recover reasonable attorney's fees.

PRAYER

WHEREFORE, Plaintiff requests that Defendants be cited to appear and answer, and that on final trial, Plaintiffs have judgment for:

a. injunctive relief restraining the Defendants from further nonjudicial acts against the Plaintiff;
b. $50,000,000 for damages;
c. $50,000,000 for exemplary damages;
d. Post-judgment interest as provided by law;
e. Costs of suit;
f. Reasonable attorney's fees;
g. Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

JUAN PERALES, JR., *Pro Se*
ATTORNEY AT LAW
ADMISSIONS I.D. NO.: 4595
SBN: 15770900
432 W. AVE. J
P.O. Box 592
ROBSTOWN, TEXAS 78380
512/387-9808

Dated March 15, 1991.

CERTIFICATE OF SERVICE

This is to certify the above and foregoing Plaintiff's Complaint and attached Application for Preliminary Injunction and Expedited Hearing has been delivered to the Defendants MIKE WESTERGREN, WILLIAM SEERDEN, and FORTUNATO BENAVIDEZ and by delivery of a true copy by certified mail, return receipt requested by depositing same, postpaid, in an official depository under the care and custody of the United States Postal Service to Defendants, MIKE WESTERGREN, WILLIAM SEERDEN, and FORTUNATO BENAVIDEZ, ROBERTO GARZA and HARRY LEWIS; and by fax to the Defendant ROBERTO GARZA; on the 15th Day of March, 1991.

_____

JUAN PERALES, JR.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JUAN PERALES	§	
Plaintiff	§	
	§	
VS.	§	CIVIL CAUSE NO._____
	§	
MIKE WESTERGREN,	§	
WILLIAM SEERDEN,	§	JURY TRIAL
HARRY LEWIS,	§	
FORTUNATO BENAVIDEZ,	§	
ROBERTO GARZA,	§	
Individually and in	§	
Their Official	§	
Capacity as State	§	
Court Judges	§	
Defendants	§	

APPLICATION FOR PRELIMINARY INJUNCTION
AND REQUEST FOR EXPEDITED HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JUAN PERALES, Plaintiff and pursuant to Rule 65 moves this Court for oral hearing on the application for preliminary injunction pending final trial on the merits at the earliest possible date and in support thereof would show immediate and irreparable harm as follows:

I.

The Plaintiff incorporates the Complaint as if fully set forth herein.

II.

The Defendants, elected state court judges, continue with the unlawful nonjudicial acts against the Plaintiff. The relief for preliminary injunction goes to the heart of the complaint that the Defendants' continuing unlawful actions resulting from the suit filed by the City of Robstown's Utility Board against the City of Robstown do not amount to judicial acts and are prohibited. The Defendants by Texas law are prohibited from acting judicially in connection with any suit or action filed by the Utility Board since the members of the board were and are without lawful authority to invoke the judicial machinery. *Guadalupe Blanco River Authority v. City of San Antonio*, 200 S.W.2d 989, 1000 (Tex. 1947). Such permanent injunction or unlawful acts of the Defendants against the Plaintiff, the members of the city council and the City of Robstown do not amount to judicial acts yet extend to the Plaintiff, individually and as former city attorney for the City of Robstown. The nonjudicial acts are causing the illegal restraint of the Plaintiff's personal freedoms and liberty. Most importantly, the Plaintiff continues to be subjected to the illegal arrest and illegal

incarceration. On February 20, 1991, the Plaintiff was assessed 60 days in jail as the result of the unlawful nonjudicial acts of the Defendants. The false incarceration is to begin on March 22, 1991.

III.

The permanent injunction, the citation orders and contempt orders evidence the continuing unlawful nonjudicial acts of the Defendants which are causing grave and irreparable harm to the Plaintiff, the former members of the city council, the present city council and all the citizens of the City of Robstown. Any delay continues to cause grave and irreparable harm. The Defendants' continuing unlawful nonjudicial acts certainly create extraordinary circumstances and are awesome in their implications. The present conditions generate a presently existing actual threat. The personal freedoms and liberty of the Plaintiff continue to be at stake and the illegal restraint of the governing body subverts the city council. Such extraordinary circumstances require immediate preliminary injunctive relief.

The unlawful nonjudicial acts of the Defendants violate the Plaintiff's rights to equal protection, freedom of

liberty, property, as well as to the right of a republican form of government, legislative immunities and first amendment rights. The Plaintiff continues to suffer false arrest and imprisonment. The Plaintiff has shown conditions generating a presently existing actual threat with resulting injury, and invasion of rights. The power of this court should be unleashed against the Defendants from unlawful nonjudicial acts and this court has the duty to restrain prima facie violations of the law.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, JUAN PERALES, respectfully requests this Honorable Court grant the Application for preliminary injunction pending the final trial on the merits and any such further relief to which Plaintiff may be entitled.

Respectfully submitted,

JUAN PERALES, JR., *Pro Se*
ATTORNEY AT LAW
ADMISSIONS I.D. NO.: 4595
SBN: 15770900
432 W. AVE. J
P.O. Box 592
ROBSTOWN, TEXAS 78380
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Dated March 15, 1991.